

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CORDELL A. THORSON and DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION, LOS ANGELES AIR TRAFFIC
CONTROL CENTER, Los Angeles, Calif.

*Docket No. 97-2608; Submitted on the Record;
Issued June 23, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether appellant has established that he sustained an emotional condition in the performance of duty as alleged.

On January 6, 1997 appellant, then a 33-year-old air traffic controller, filed a claim alleging that he sustained an emotional condition in the performance of duty on or before December 31, 1996. Appellant attributed his condition to a December 21, 1996 incident in which his immediate supervisor, Mr. Gary Tomak, notified him of a "two-week suspension to begin on January 18, 1997."¹ Yet, on December 31, 1996 at 2:00 p.m., Mr. Tomak gave appellant and his co-workers an award for the "same performance criteria resulting in [the] suspension."² Appellant stopped work on January 6, 1997³ and returned to work on February 4, 1997.

In a February 3, 1997 report, Dr. John Beck, an attending Board-certified psychiatrist and neurologist, related appellant's account of a February 1996 altercation between appellant and coworker Mr. John Valverde. Appellant had been speaking with his supervisor, Mr. Tomak, when Mr. Valverde came up and added his two cents. Appellant walked off and pounded his fist

¹ The record contains a November 1, 1996, notice of proposed suspension for issuing improper and unsafe instructions to a pilot on August 12, 1996. Appellant responded to the proposed suspension, asserting that employing establishment regulations justified his actions and alleging that Mr. Tomak was trying to get him fired and using the August 12, 1996 incident as an excuse.

² The record contains a November 1, 1996 "time-off" award for superior performance, presented to appellant on December 31, 1996, for his participation in an operational error and deviation prevention initiative.

³ In a January 9, 1997 note, Dr. Mel R. Valenzuela, an attending family practitioner, stated that appellant would be off work from January 6 to February 4, 1997 because of "significant stress." However, Dr. Valenzuela did not mention appellant's employment or any work factors in this report.

into his hand. Mr. Valverde came up and invited appellant to do that to his face, which appellant interpreted as a threat. Appellant later had a meeting with Mr. Tomak and a union representative about the incident, in which Mr. Tomak threatened appellant with disciplinary action if appellant filed a grievance against Mr. Valverde. In June 1996, appellant then decided to file an unfair labor practice grievance against Mr. Tomak. Appellant also filed an unsatisfactory condition report against Mr. Tomak for being made to work a 10-hour day, at which time Mr. Tomak made appellant work a 10-hour and 15-minute day. Appellant filed a complaint against Mr. Tomak for altering appellant's time sheet, at which time Mr. Tomak called a meeting with appellant and his union representative regarding his directions to a pilot on August 12, 1996, eventually resulting in a 10-day suspension. Appellant and his coworkers received an award in December 1996 for "high performance" during the time when the alleged pilot complaint took place." In late December 1996, appellant used sick time because of restlessness, insomnia and bad dreams about shouting matches with Mr. Tomak. On examination, Dr. Beck found appellant "[a]nxious, restless," overwhelmed, fearful of reprisals when he would return to work on February 4, 1997 following his suspension, and unable to sleep a full night. Dr. Beck recommended "a conciliatory posture on his return to work."⁴

In a February 3, 1997 letter, Dr. Beck stated that appellant was off work from January 6 to February 3, 1997 due to "illness" from "work stress due to relational problems with his immediate supervisor, Gary Tomak." Dr. Beck released appellant to return to work.

In a March 19, 1997 letter, Mr. Tomak asserted that the 10-day suspension was justified. He stated that on 2:00 p.m. on December 31, 1996, appellant was at a staff briefing, and worked the midnight shift the morning of January 1, 1997. He thus concluded that appellant's claimed condition could not be attributed to a December 31, 1996 incident as alleged.

By decision dated March 28, 1997, the Office denied appellant's claim on the grounds that appellant had not demonstrated that he sustained an emotional condition in the performance of duty as he did not establish any compensable factors of employment.⁵

In an April 17, 1997 letter, appellant requested reconsideration, and reiterated the history of employment incidents he provided to Dr. Beck on February 3, 1997. He also alleged widespread violations of employing establishment regulations by Mr. Tomak and other employing establishment officials.⁶

In a June 13, 1997 memorandum, Mr. Charles H. Usrey, an employing establishment official, noted assisting Mr. Tomak in coordinating appellant's 10-days suspension. Regarding

⁴ In an April 9, 1997 letter, Mrs. Lori Thorson, appellant's wife and an air traffic controller at the employing establishment, alleged a conspiracy by Mr. Tomak and other employing establishment officials to have appellant fired.

⁵ The Office found that while the December 21, 1996 notification of suspension and the December 31, 1996 team award were accepted as factual, they were administrative matters not within the performance of duty.

⁶ Appellant submitted documents regarding the August 12, 1996 incident, including copies of grievances against Mr. Tomak, and a workplace violence policy statement. There are no final actions of record with regard to the grievances.

appellant's allegations that it was inconsistent to suspend and reward him for avoiding an operational error, Mr. Usrey stated that the methods appellant used on August 12, 1996 "were inconsistent with good operating practices and corrective disciplinary actions were appropriate."

In a June 17, 1997 letter, Mr. Tomak stated that Mr. Valverde "did state, in reference to [appellant's] fist pounding action, "Let's see you do that to my face." Mr. Tomak also admitted altering the sign-out log regarding appellant's overtime. Mr. Tomak explained that on August 12, 1996, appellant twice instructed a Southwest commercial pilot to make a 360 degree turn into hazardous weather, despite the pilot's two requests for alternate instructions, thus endangering the aircraft. Mr. Tomak thus proposed a 10-day suspension.⁷

In a June 24, 1997 report, Dr. Beck related appellant's account of Mr. Tomak's continuing criticism, "intimidation and harassment" and a mid-June confrontation with Mr. Valverde. Also, Mr. Valverde allegedly criticized appellant to coworkers and to Mr. Tomak, to which Mr. Tomak responded that appellant would "not have to hear such things if [appellant] did not do a [substandard] job." Appellant noted that an administrative resolution process would not render a final decision for several more weeks. Dr. Beck noted symptoms of insomnia, anxiousness, pessimism and nightmares of Mr. Valverde pursuing him with a gun.

In a June 24, 1997 letter, Dr. Beck noted that the "hostile" work environment had not resolved. Dr. Beck diagnosed an adjustment disorder with mixed emotional features, and recommended appellant not return to work "until some resolution has been established."⁸

By decision dated July 25, 1997, the Office modified the March 28, 1997 decision, finding that appellant had established two compensable factors of employment, but submitted insufficient medical evidence to establish a causal relationship between those factors and the claimed emotional condition. The Office accepted that on May 26, 1996, appellant had a disagreement with Mr. Tomak regarding a trainee's performance, was interrupted by Mr. Valverde, became frustrated and walked away, pounding his fist into his other hand, whereupon Mr. Valverde said "Let's see you do that to my face." The Office also accepted that on May 25, 1996,

Mr. Tomak

⁷ Mr. Tomak made similar statements in a November 14, 1996 statement.

⁸ In a June 27, 1997 report, Dr. Beck recommended that appellant not work at the employing establishment "as of June 15, 1997 until his condition improves or his work conflict has been resolved."

erred by changing appellant's overtime notation on a sign-out record to reflect two hours and 13 minutes credit time, whereas appellant was entitled to overtime.⁹ The Office further found, however, that Dr. Beck's June 24, 1997 report and treatment notes did not provide an opinion "with medically supportive reasoning, on the relationship between [appellant's] psychiatric condition and the [accepted] work factors."

The Board finds that appellant has failed to establish that he sustained an emotional condition in the performance of duty as alleged.

When an employee experiences an emotional reaction to his or her regular or specially assigned work duties or to a requirement imposed by the employment, or has fear and anxiety regarding his or her ability to carry out his or her duties, and the medical evidence establishes that the disability resulted from an emotional reaction to such situation, the disability is generally regarded as due to an injury arising out of and in the course of employment and comes within the scope of coverage of the Act.¹⁰ When working conditions are alleged as factors in causing disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship, and which working conditions are not deemed factors of employment and may not be considered.¹¹

In the present case, the Office made specific findings on each of the factors appellant implicated. The Office accepted that on May 25, 1996, Mr. Tomak, appellant's supervisor, erred by changing appellant's sign-out record to reflect two hours and 13 minutes credit time, whereas appellant was entitled to overtime. Although time and attendance records are administrative matters not considered to be in the performance of duty, the Board has found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted reasonably.¹² In this case, as Mr. Tomak admitted his error in

⁹ The Office further found several incidents occurred as alleged but were not within appellant's performance of duty: in a June 2, 1996 meeting between appellant and his union representative regarding the May 26, 1996 incident with Mr. Valverde, Mr. Tomak advised appellant that if action was taken against Mr. Valverde, Mr. Tomak would institute disciplinary action against appellant for "creating a disruption in the work area"; a June 11, 1996 meeting between appellant, his union representative and supervisor K. Dale Raulston requesting that disciplinary action be taken against Mr. Valverde for the May 26, 1996 incident; on July 26, 1996, appellant's union representative filed a grievance against Mr. Tomak regarding the May 26, 1996 incident; Mr. Tomak requested that appellant work 13 minutes overtime after a 10-hour shift on August 25, 1996; appellant was suspended for 10 days by November 1, 1996 proposal finalized December 21, 1996, based on Mr. Tomak's determination that on August 12, 1996, appellant did not follow safe operating practices in instructing a pilot to turn his aircraft into hazardous weather on approach to Los Angeles, although appellant asserted he was trying to avoid an operational error; on December 31, 1996 appellant and coworkers were given an award for 180 days without an operation error, which appellant perceived as "contradictory because he was being suspended for 10 days for avoiding an operational error."

¹⁰ *Lillian Cutler*, 28 ECAB 125 (1976).

¹¹ *See Barbara Bush*, 38 ECAB 710 (1987).

¹² *See Richard Dube*, 42 ECAB 916 (1991).

a June 17, 1997 corroborating statement, his alteration of appellant's sign out entry was within the performance of duty.

The Office also accepted the May 26, 1996 altercation in which Mr. Valverde, a coworker, threatened appellant. The interaction arose in the course of his employment, at a place where he was expected to be in connection with his employment, and while he was fulfilling the duties of his employment or engaged in doing something incidental thereto.¹³ The record contains a June 17, 1997 corroborating statement from Mr. Tomak, who witnessed the incident, stating that Mr. Valverde made a threatening remark to appellant.

As the Office accepted the May 25, 1996 log alteration and May 26, 1996 altercation as covered factors of employment, the medical record must be examined to determine if it supports a causal relationship between the accepted factors and the claimed emotional condition. In support of his claim, appellant submitted reports from Dr. John Beck, an attending psychiatrist and neurologist.

In a February 3, 1997 report and accompanying letter, Dr. Beck related appellant's account of the altercation with Mr. Valverde, and Mr. Tomak altering appellant's sign out log entry. Dr. Beck noted symptoms on examination, and found appellant disabled from January 6 to February 3, 1997 due to an unspecified "illness" from "work stress" due to problems with Mr. Tomak. In a June 24, 1997 report and accompanying letter, Dr. Beck related appellant's account continued harassment by Mr. Tomak, noted symptoms on examination, diagnosed an adjustment disorder with mixed emotional features, and recommended that appellant "not return to the workplace until some resolution has been established." Although Dr. Beck thus evinces an accurate knowledge of the compensable factors of employment and diagnosed an adjustment disorder, he did not provide medical rationale explaining how those factors would cause the diagnosed disorder. Thus, his opinion on causal relationship is of diminished probative value and is insufficient to meet appellant's burden of proof on this issue.¹⁴

The Office also made findings as to which of the alleged factors were accepted as factual, but not covered under the Act. Regarding the 10-day suspension, disciplinary actions are not considered to be in the performance of duty,¹⁵ but are administrative or personnel matters, unrelated to the employee's job duties. The Board finds that the employing establishment acted reasonably¹⁶ and appellant has not established that the employing establishment erred or acted abusively with regard to the 10-day suspension. In a June 13, 1997 memorandum, Mr. Charles H. Usrey, an employing establishment official, stated that appellant's instructions to a pilot on August 12, 1996 "were inconsistent with good operating practices and corrective disciplinary actions were appropriate." In a June 17, 1997 letter, Mr. Tomak stated that on August 12, 1996, appellant's instructions for a commercial pilot to fly into hazardous weather

¹³ *Josie P. Waters*, 45 ECAB 513 (1994); *Monica M. Lenart*, 44 ECAB 772 (1993).

¹⁴ *Lucrecia M. Nielsen*, 42 ECAB 583 (1991).

¹⁵ *See Larry D. Passalacqua*, 32 ECAB 1859 (1981).

¹⁶ *See Richard Dube*, 42 ECAB 916 (1991).

endangered the aircraft, warranting the 10-day suspension. Thus, appellant has not established a compensable employment factor under the Act in this respect.¹⁷

Similarly, regarding the June 2 and 11, 1996 meetings in which appellant requested that the employing establishment take disciplinary action against Mr. Valverde regarding the May 26, 1996 incident, and his frustration when no punitive measures were instituted, the Board finds that these are disciplinary, administrative matters not in the performance of appellant's duties, and not covered under the Act. Appellant has not established error or abuse by the employing establishment regarding the meetings or the refusal to implement disciplinary action. Regarding a July 26, 1996 grievance against Mr. Tomak regarding the May 26, 1996 incident; the Board notes that there is no final action of record concerning the grievance, and that appellant has not demonstrated that the employing establishment acted with error or abuse in its processing.

Regarding Mr. Tomak's request that appellant work 13 minutes overtime after a 10-hour shift on August 25, 1996, the Board has held that overwork may be a compensable factor of employment.¹⁸ The evidence in this case, however, is insufficient to establish that appellant was in fact over worked, either regarding the 13 minutes of overtime, or being made to work a 10-hour shift instead of an 8-hour shift.

Regarding appellant's reaction to the December 1996 performance award, the award was an administrative function of the employer, and not the duty of appellant. Lacking evidence of error or abuse on the part of the employer, such functions do not constitute factors of employment. The Board has held that reactions to assessments of performance are not covered by the Act.¹⁹

Appellant has also alleged a pattern of harassment from the employing establishment, in particular, Mr. Tomak. In order to establish compensability under the Act, however, there must be evidence that harassment did in fact occur. The Board notes that unfounded perceptions of harassment do not constitute an employment factor.²⁰ In the present case, appellant has not submitted sufficient evidence to support the alleged incidents of harassment. Accordingly, the Board finds that appellant has failed to substantiate his claims of harassment or "intimidation."

Consequently, appellant has not established that he sustained an emotional condition in the performance of duty as alleged, as he submitted insufficient rationalized medical evidence demonstrating a causal relationship between the claimed condition and accepted factors of employment.

¹⁷ See *Frederick D. Richardson*, 45 ECAB 454 (1994).

¹⁸ *Sandra F. Powell*, 45 ECAB 877 (1994); *William P. George*, 43 ECAB 1159 (1992); *Georgia F. Kennedy*, 35 ECAB 1151 (1984).

¹⁹ *Michael Thomas Plante*, 44 ECAB 510 (1993); *Effie O. Morris*, 44 ECAB 470 (1993).

²⁰ *Kathleen D. Walker*, 42 ECAB 603 (1991).

The decision of the Office of Workers Compensation Programs dated July 25, 1997 is hereby affirmed.²¹

Dated, Washington, D.C.
June 23, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member

²¹ The final decision in this case was issued on July 25, 1997. Following this decision, appellant and the employing establishment submitted additional evidence to the Office. The Board may not consider evidence for the first time on appeal that was not before the Office at the time it issued the final decision in the case. 20 C.F.R. § 501.(2)(c).